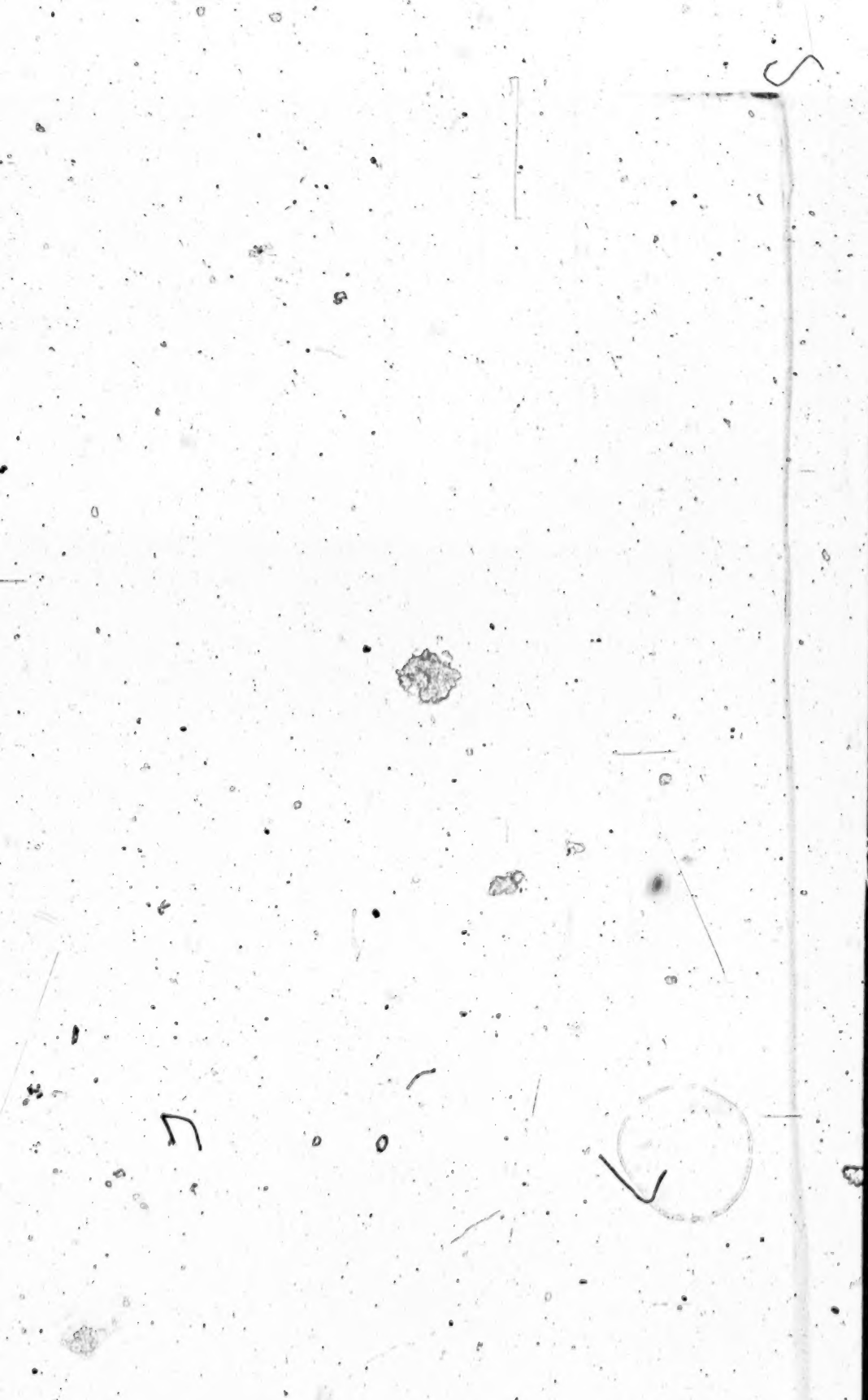

No. 1036

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

CHRYSLER CORPORATION, DESOTO MOTOR CORPORATION, PLYMOUTH MOTOR CORPORATION, DODGE BROTHERS CORPORATION, AND CHRYSLER SALES CORPORATION,

Appellants,

vs.

THE UNITED STATES OF AMERICA

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF INDIANA

BRIEF FOR THE APPELLANTS

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Opinions Below.

The trial court rendered no opinion. Its findings of fact and conclusions of law appear at R. 155-156.

Jurisdiction.

The decree of the district court—in modification of final decree as modified—was entered February 16, 1942 (R. 156).

The appeal was allowed by the district judge for the Northern District of Indiana on February 18, 1942 (R. 161). The jurisdictional statement required by Rule 12 of this Court was filed March 13, 1942, and probable jurisdiction was noted on March 16, 1942 (R. 166), under the provisions of the Expediting Act of February 11, 1903, c. 544, Sec. 2, 32 Stat. 823, as amended, 15 U. S. C. Sec. 29, and Section 238 of the Judicial Code, as amended, 28 U. S. C. Sec. 345.

Question Presented.

Whether, the parties not consenting and the issues being controverted by the defendants' answer, the trial court erred in modifying an antitrust consent decree by extending one of its restraints, upon a mere assertion as to the purpose of the decree and in direct conflict with the intent plainly expressed on the face of the decree.

Statement.

This is an appeal from a final decree of the District Court of the United States for the Northern District of Indiana, South Bend Division, dated February 16, 1942, by which that court, for the second time modified an earlier final decree, dated November 15, 1938 (R. 156). The original decree (R. 24) had been entered upon the consent of the parties in a suit in equity brought by the United States under the Sherman Antitrust Act.

The original proceeding and the consent decree.—On November 7, 1938, the United States filed a bill of complaint under the Sherman Antitrust Act against Chrysler Corporation and certain of its subsidiaries (hereinafter sometimes collectively called Chrysler) (R. 1). The bill alleged, among other things, that during the three years next preceding the filing of the bill General Motors Corporation had manufactured and sold 7,000,000 automobiles

and Ford Motor Company and Chrysler each had manufactured and sold 4,000,000 automobiles (R. 5), and that these three manufacturers had conspired separately with their respective affiliated finance companies, but not with each other (R. 8). The bill prayed, among other things, that Chrysler be restrained "from acquiring in any way an interest in any finance company or by gift, loan or otherwise rendering financial assistance to any finance company" (R. 13).

On the same day, Chrysler answered the bill of complaint, denying its material allegations (R. 15), and the United States and Chrysler then consented to the entry of the decree of November 15, 1938 (R. 24). Since General Motors Corporation—the principal competitor of Chrysler—did not consent to a decree, the Government, as the face of the consent decree shows, recognized that Chrysler ought not to suffer unlimited competitive disadvantage.[1]

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[1] The restraining features of the decree may be briefly outlined:

Paragraph 6 restrains Chrysler from the doing of specific acts in its dealings with finance companies and dealers.

Paragraph 7 imposes restraint on Commercial Credit Company and its affiliate companies and is not pertinent here.

Paragraph 8 reserves a conditional right in the United States to proceed further against Commercial Credit.

Paragraph 9 prohibits Chrysler and Commercial Credit from doing in combination or conspiracy any act prohibited by the decree.

Paragraph 10 places the burden upon Chrysler, upon complaint by the United States of failure to comply with Paragraph 6, to establish that the acts complained of are not for a forbidden purpose.

Paragraph 11 requires defendants to mail copies of the decree to their dealers, representatives, etc.

Paragraph 12 is the section in question in this cause and is hereinafter discussed at length.

Paragraph 12a provides:

Clause (1): If the pending criminal case does not result in a judgment of conviction against G.M.C. and G.M.A.C., the whole consent decree shall be "inoperative and suspended" until by decree substantially identical restraints are imposed upon G.M.C. and G.M.A.C.

Clause (2): A general verdict and judgment in the criminal case shall be treated as a determination of the illegality of any act stated in the

The parties therefore included, in the consent decree, clauses intended to protect Chrysler both (1) against the consequences of possible failure of the Government to secure, by litigation against General Motors, restraints as broad as it had obtained from Chrysler by consent and also (2) against the consequences of delay in the civil proceedings against General Motors.

To this end the consent decree contains a number of clauses authorizing the court to relieve Chrysler of certain precisely defined restraints of the consent decree upon the happening of certain equally precisely defined conditions. It is to be noted that Paragraph 12, which the court below modified, and Paragraph 12a are entirely different sections of the decree—that is, Paragraph 12a is not a subsection of Paragraph 12. Subparagraphs (1), (2) and (3)i, (3)ii and (3)iii of Paragraph 12a deal with restraints other than the one modified by the court below. They provide that, if the criminal proceeding then pending against General Motors Corporation should result otherwise than in conviction, all of the restraints of the consent decree would be suspended until General Motors were subjected to similar restraints (R. 41); that after entry against General Motors Corporation of a

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instruction to the jury to constitute a proper basis for a verdict of guilty. Such determination of illegality is to be considered as the equivalent of a decree restraining performance of such act for the purposes of clause 3 of Paragraph 12a unless such determination is based (a) upon ownership by G.M.C. of G.M.A.C. or (b) upon performance by G.M.C. of such act in combination with some act with which Chrysler was not charged in the criminal indictment against it.

Clause (3): After the entry of a decree or judgment of conviction against G.M.C. or after January 1, 1940, whichever is earliest, the court on application of Chrysler will enter orders:

Subclause (i): "suspending" the restraints imposed in Paragraph 6(d), (e), (f), (h), (i), (j), (k), (l) to the extent not imposed and until imposed on G.M.C.

Subclause (ii): "suspending" the restraint imposed in the remaining subsections of Paragraph 6 to the extent they are not imposed on G.M.C. if Chrysler shall prove that G.M.C. is performing any act prohibited to Chrysler by such remaining subsections of Section 6.

decree, or after conviction of General Motors in the criminal proceeding then pending, or after January 1, 1940, whichever occurred first, the court, upon application of Chrysler, would enter an order or orders suspending four of the restraints of Paragraph 6, and three of the restraints of Paragraph 7, of the consent decree to the extent that a final decree or its equivalent as defined in the consent decree had not imposed similar restraints upon General Motors (R. 41-42); and that the court would enter an order suspending other restraints of Paragraphs 6 and 7 if General Motors were not, by January 1, 1940, bound by a decree or its equivalent and if the appellants could prove General Motors was doing acts those restraints prohibited the appellants from doing (R. 42-43).[2]

Regarding the restraint of Paragraph 12, which prohibits Chrysler from having any interest in a finance company and which the court below modified, the original consent decree provided in the second paragraph of Paragraph 12 the following "express condition":

> It is an express condition of this decree that notwithstanding the provisions of the preceding paragraph of this paragraph 12 and of any other provisions of this decree, if an effective final order or decree not subject to further review shall not have been entered on or before January 1, 1941, requiring General Motors Corporation permanently to divest itself of all ownership and control of General Motors Acceptance Corporation and of all interest therein, then and in that event, nothing in this decree shall preclude the Manufacturer from acquiring and retaining ownership of and/or control over or interest in any finance company, or from dealing with such finance company and with the dealers in

[2] The criminal proceeding against General Motors resulted in conviction on November 17, 1939. As appears from the record in that case, that conviction was not based upon ownership by General Motors Corporation of General Motors Acceptance Corporation. The jury acquitted all of the individual defendants. (R. 65.) *United States* v. *General Motors Corporation*, 121 F. (2d) 376, cert. denied Oct. 13, 1941.

> the manner provided in this decree or in any order of modification or suspension thereof entered pursuant to paragraph 12a. The Court, upon application of respondents or any of them, will enter an order or decree to that effect at the foot of this decree, and the right of any respondent herein to make the application and to obtain such order or decree is expressly conceded and granted.

Thus, while Paragraph 12a merely suspended the restraints to which it refers upon the happening of the conditions mentioned therein, and contemplated reimposing those restraints upon the happening of still later conditions, the express condition of Paragraph 12 provided, upon the stated contingency, for the absolute termination of the restraint upon Chrysler's owning a finance company and did not provide for reimposing this restraint upon Chrysler upon some later event.

The consent decree, therefore, contains a series of express clauses for suspending or terminating the various restraints according to a number of closely defined contingencies that might arise.

The Government's first motion.—Notwithstanding the express condition of the consent decree against Chrysler, the United States waited twenty-three months before it filed its bill in equity against General Motors Corporation and General Motors Acceptance Corporation to compel General Motors to divest itself of the Acceptance Corporation (R. 60). Not until October 4, 1940, less than three months before the expiration of the period within which the United States was to secure a decree against General Motors or appellants were to be released from the restraint of Paragraph 12, did the United States file its bill in equity in the District Court of the United States for the Northern District of Illinois, Eastern Division, seeking the result upon which continued restraint of appellants under Paragraph 12 was predicated (R. 60).

On December 17, 1940, two weeks before the restraint upon Chrysler's owning a finance company was to expire, the Government moved for an order extending that restraint for one year, until January 1, 1942, upon the ground that the time "was by mistake of the parties underestimated" (R. 47-51). The Government did not allege any changed conditions of fact or law that justified extending the restraint, and did not offer evidence; and the trial court, without findings of fact or conclusions, entered a decree extending the restraints of Paragraph 12 to January 1, 1942 (R. 56-57). Appellants appealed to this Court, which heard oral argument on October 24, 1941. On December 8, 1941, the Court dismissed the appeal for "want of a quorum of justices qualified to sit," the Chief Justice and three Associate Justices being "unable to take part in the consideration or decision of these cases on the merits," and it denied the appellants' petition for rehearing on January 5, 1942.

The present motion.—On December 16, 1941, the Government moved again, asking the trial court to extend the restraint for a second year, until January 1, 1943 (R. 58-62). It based this request on an assertion that the purpose of the express condition of Paragraph 12 of the consent decree was to make the restraint upon Chrysler abide the event of the civil suit against General Motors (R. 59). The motion was returnable on December 22, 1941 (R. 58). The district court heard argument on the motion on that day (R. 67-68). The Government offered as its only evidence (R. 166) copies of papers filed in the civil suit against General Motors Corporation in the United States District Court for the Northern District of Indiana (R. 68-153). These proved only that the Government had not, as required by the express condition of Paragraph 12 of the consent decree, obtained a civil decree against General

Motors and, as a matter of fact, had not even joined issue in those proceedings (R. 153).

After taking this evidence and hearing argument, the trial judge adjourned the hearing to February 16, 1942 (R. 153-154). On that day the Government did not offer further evidence; and, the Government's evidence at the earlier hearing not having created any issue of fact, appellants did not offer evidence (R. 154). The judge thereupon made findings of fact and conclusions of law (R. 155-156) and entered the decree, now on appeal, extending the restraint of Paragraph 12 against Chrysler until January 1, 1943 (R. 156-157).

Specification of Errors.

The court below erred (R. 158-161):

1. In finding (Finding No. 3) "that the provisions of [Paragraph] 12 of the consent decree from which modification is sought were framed upon the basis that the ultimate rights of the parties thereunder should be determined by the Government's civil antitrust proceedings against General Motors Corporation and affiliated companies", contrary to the express language of Paragraph 12 of the original consent decree, and in the complete absence from the record of any evidence to support such finding.

2. In finding (Finding No. 4) "that time was not of the essence with respect to lapse of the bar against affiliation", contrary to the express language of Paragraph 12 of the original consent decree, and without any evidence in the record to support such finding.

3. In finding (Finding No. 8) "that the Government has proceeded diligently and expeditiously in its suit to divorce General Motors Acceptance Corporation from General Motors Corporation", upon evidence clearly disclosing undue delay by the plaintiff.

4. In finding (Finding No. 9) "that further extension of the bar against affiliation will not impose a serious burden upon defendants", contrary to the recognition of the fact of such burden by both parties in fixing the terms of the consent decree, and in the complete absence of any evidence in the record to support such finding.

5. In concluding as a matter of law (Conclusion No. 1) that the order entered December 21, 1940, became the law of the first petition for extension in the case, insofar as, if at all, such conclusion involves a holding that the determination of questions of law upon which that order was based are binding in the present decision on the plaintiff's motion for Modification of the Final Decree and of the Final Decree as Modified, and are not now subject to reconsideration or review.

6. In concluding as a matter of law (Conclusion No. 2) that the court may in the exercise of its equity jurisdiction, and pursuant to plaintiff's mere motion, properly make an order for injunctive restraint of defendants, without requiring any evidence in support of the allegations upon which the motion founds plaintiff's right to such restraint.

7. In concluding as a matter of law (Conclusion No. 3) "that the purpose and intent of the decree will be carried out if Chrysler is given the opportunity at any future time to propose a plan for the acquisition of a finance company, and to make a showing that such plan is necessary to prevent Chrysler Corporation from being put at a competitive disadvantage during the pendency of complainant's civil litigation against General Motors Corporation, et al."; in disregard of the express and unambiguous provisions, particularly Paragraph 12, of the original consent decree, upon findings supported by no evidence, and without requiring the plaintiff to produce any evidence in support of its allegations as to purpose and intent denied by the answer.

8. In impliedly holding as a matter of law that after entry of a consent decree barring affiliation of the defendants with a finance company for a definitely fixed period, a court may—without proof of the affirmative allegations in support of the motion and denied by the answer, and without the consent of the parties—nevertheless further extend the bar against affiliation by an injunctive order upon a finding that to do so will not impose a serious burden upon defendants.

9. In modifying the Final Decree—In Modification, without requiring evidence in support of the allegations contained in plaintiff's motion and controverted in defendants' answer.

10. In failing and refusing to dismiss plaintiff's Motion for Modification of the Final Decree and of the Final Decree as Modified, for failure of the plaintiff to allege or prove facts sufficient to entitle the plaintiff to the relief it sought by said motion.

11. In enjoining the defendants from acquiring and retaining ownership of, or control over, or interest in, any finance company until after January 1, 1943.

12. In failing to hold that defendants, on and after January 1, 1941, pursuant to the terms of the original consent decree, and on and after January 1, 1942, pursuant to the terms of the Final Decree—In Modification, were and are no longer precluded from acquiring and retaining ownership of and/or control over, or interest in any finance company or from dealing with such finance company and with defendants' dealers in the manner provided in said original consent decree.

13. In modifying the consent decree without acquiescence of the parties.

14. In rendering the Final De ·ee—In Modification of Final Decree as Modified, filed and entered herein in the District Court of the United States for the Northern District of Indiana, South Bend Division, on February 16th, 1942, wherein said court modified Paragraph 12 of said consent decree, dated November 15, 1938.

Argument.

There was nothing before the court to warrant its rewriting the consent decree; and its action in arbitrarily doing so, without either evidence or the consent of the parties, was not due process of law.

Except as the findings and conclusions of the court below are to the effect that the United States had not performed the express condition of Paragraph 12 of the consent decree, there is no evidence to support them, none having been offered. Indeed, the Government seems not to regard the case as one for proof, and merely asks the courts to disregard the provision of the decree relating to the termination of the restraint, without evidence and merely upon the assertion that the "purpose" of the consent decree was to make Chrysler's right to have an interest in a finance company abide the event of the General Motors suit. Since the terms of Paragraph 12 of the decree do not so provide, the courts are asked to rewrite the decree so as to continue the restraint upon Chrysler until January 1, 1943, and the Government indicates that it intends to repeat this request indefinitely until the end of the General Motors suit (R. 60). But, since there is no ambiguity in the language of Paragraph 12, the issue is not one of construing the consent decree. This the Government in effect admits because, otherwise, it would not have filed its present motion to revise the express terms of the decree. Moreover, since the Government has offered no evidence showing a change

of circumstances requiring a modification of the decree, the issue is not one of conforming the decree to a different or a new state of facts. The only issue is whether, merely at the request of the Government and without either consent or evidence, the court below was correct in rewriting an important clause of the consent decree to the detriment of Chrysler.

Since Paragraph 12 by its own terms provides that Chrysler shall not continue bound if the Government has not obtained its civil decree against General Motors by January 1, 1941, the Government finds itself driven to claim that Paragraph 12 means the opposite of what its says and is itself the source of a right of the Government to have decrees modifying Paragraph 12 entered upon request as long as the Government has failed to perform the condition of Paragraph 12. But the unambiguous Paragraph 12 itself permits of no such construction. It provides, as an "express condition", that

> notwithstanding the provisions of the preceding paragraph of this paragraph 12 and of any other provisions of this decree, if an effective final order or decree not subject to further review shall not have been entered on or before January 1, 1941, requiring General Motors Corporation permanently to divest itself of all ownership and control over General Motors Acceptance Corporation and of all interest therein, then and in that event, nothing in this decree shall preclude [Chrysler] from acquiring and retaining ownership of and/or control over or interest in any finance company. * * * The Court, upon application of the respondents, or any of them, will enter an order or decree to that effect at the foot of this decree, and the right of any respondent herein to make the application and to obtain such order or decree is expressly conceded and granted.

There was nothing more before the court below upon which it could modify the decree.

A. THE INTERPRETATIVE ARGUMENTS TO WHICH THE GOVERNMENT RESORTS ARE WHOLLY IMMATERIAL IN VIEW OF THE EXPRESS LANGUAGE OF PARAGRAPH 12 OF THE DECREE.

In view of the lack of substance in its case, the Government is driven to resort to a variety of interpretative arguments in the effort to spell out of the decree itself a ground for changing its terms.

1.

The Government's bald assertion of a "purpose" of the consent decree different from its plain language was not ground for rewriting the decree.—Paragraph 12 does not contain any ambiguity for the courts to construe. By its language, it provides for protecting Chrysler in precisely the event that has happened, that is, the failure of the Government to secure a decree against General Motors within the agreed time. It does not provide for rewriting the decree to take away that protection because of the happening of the very event upon which the protection of the Paragraph was expressly designed to come into operation.

The consent decree contains other clauses protecting Chrysler in the manner and upon the conditions set forth in those clauses respectively. The Government, however, cannot point to any one of these, or to any other provision of the decree, which by its terms attempts or purports to restrict this provision of Paragraph 12. There is no conflict for the court to reconcile. The terms of Paragraph 14 reserving, as the Government states, jurisdiction to modify the decree do not contain any language limiting Paragraph 12 and at the most can be effective only upon a proper showing supported by evidence, for it is merely the customary reservation of equity jurisdiction which would exist even without express reservation. *United States* v. *Swift & Co.*, 286 U. S. 106, 114-115. If there were any question of construction, Paragraph 12 sets forth explicitly the rule to

apply. The condition of that Paragraph by its own terms expresses its provisions to be operative "notwithstanding the provisions of the preceding paragraph of this paragraph 12 and of any other provisions of this decree." Thus it controls every other provision of the consent decree and no other provision of the consent decree controls it,

There being no ambiguity in Paragraph 12 of the consent decree, and there being no other provision of the decree which modifies the clearly stated express condition of Paragraph 12, the court below was not at liberty to look beyond the decree to find a purpose opposite to the purpose the consent decree itself expresses. This Court has stated the rule many times. Where language is clear and explicit, there is no call for construction, and the courts may not resort to extraneous evidence to ascertain a different purpose. "No exposition is allowable contrary to the express words of the instrument." *Kihlberg* v. *United States*, 97 U. S. 398, 402; *Calderon* v. *Atlas S. S. Co.*, 170 U. S. 272, 280. A court may not look beyond a document "for the purpose of adding a new and distinct undertaking." *Maryland* v. *Railroad Company*, 22 Wall. 105, 113. The trial court violated this elementary rule in deciding this motion. It looked beyond the clear language of the consent decree to find a new and different meaning for the consent decree and to impose on the defendants a new and different obligation.

2.

The decree, by its language and by its substance, made time of the essence of the "express condition" of Paragraph 12.—The Government invokes a rule of the law of contracts, to the effect that time is not of the essence. But, in the first place, that doctrine ought not be applied in a situation where the party against whom it is applied cannot be compensated for the other party's delinquency, as is the rule in contract cases. Moreover, if it is to be applied here in favor of the

Government, by the same token it may be invoked by private parties to escape timely compliance with equity decrees. Finally, even if the doctrine is applicable to decrees, it does not help the Government here. For, even in contract law, the rule is settled that "one party may make his promise expressly conditional on the exact performance of any agreed condition." *3 Williston on Contracts* §846, p. 2372. *Jones* v. *United States*, 96 U. S. 24, 27; *Ellis* v. *Atlantic Mutual Ins. Co.*, 108 U. S. 342. By the language of the consent decree, the Government's obtaining a final order or decree against General Motors on or before January 1, 1941, was made an "express condition" of Chrysler's being further bound not to have an interest in a finance company.

3.

The Government's claim of diligence, and even the trial court's view that the Government was diligent, are not grounds for rewriting the consent decree to increase the burden upon Chrysler.—The condition of Paragraph 12 is express and unambiguous, and it does not depend upon the diligence of the Government in conducting its civil suit against General Motors. The finding of diligence therefore is irrelevant.

Moreover, the evidence that the Government adduced to support its allegation of diligence shows that it did not begin its suit against General Motors until October 4, 1940. This was nearly two years after the entry of the consent decree against Chrysler. The Government then, five times, voluntarily extended General Motor's time to move or answer, until July 15, 1941, more than six months after it was to have had a final decree in the case if Chrysler was to remain bound (R. 91, 95, 97, 104, 126). The Government defaulted on General Motors' motion for a further extension on July 15, 1941 (R. 136A). Thereafter the Court again extended General Motors' time to move or answer until January 15, 1942 (R. 135-153).

Chrysler had no voice in determining when the Government should start its suit against General Motors or how it should manage it. The Government started the suit when it did, and managed it as it did, with full knowledge of the terms of the express condition of Paragraph 12 of the consent decree against Chrysler. Those terms make getting a final decree against General Motors by January 1, 1941, and nothing else, the determinative test.

4.

The argument that the extension of the decree will not burden Chrysler is fallacious and unsupported.—Nothing was before the trial court to support its finding that rewriting the decree, to extend the time during which Chrysler might not have an interest in a finance company, would not impose a serious burden on Chrysler. On the contrary, the burden is both great and apparent. The Government offered no evidence on the point.

In its bill of complaint against Chrysler in the suit in which the original consent decree was entered, the Government alleged that there were about 10,000 Chrysler dealers, that in the three years before the bill was filed they had bought about two and a half billion dollars worth of automobiles from Chrysler, that General Motors dealers had bought about six and a half billion dollars worth of cars from General Motors, that the great majority of dealers were not able to do this with their own money, and that finance companies affiliated with motor car manufacturers, had supplied a large part of this money and also about two-thirds of the money required to finance the retail time sales of the dealers (R. 5-6). The heart of the Government's attack on Chrysler, Ford, and General Motors in all these finance company cases was the great benefit to these motor companies of having finance companies as affiliates. A principal purpose of the Government's attack

was to end the affiliation. As appears from the face of the Government's bill in equity against Chrysler and upon the the face of the original consent decree, the problem in drawing the consent decree here involved was how long Chrysler, as a competitor of General Motors, could afford to submit itself to the restraint of the consent decree while General Motors remained free; and how long the Government with any show of fairness to Chrysler, and regard for the best interests of the public in preserving competition, could ask Chrysler to stand such an unequal burden. The situation was further aggravated by the fact that the Government could not, or at least did not, commit itself even to undertake to compel General Motors to divorce its finance company.

The parties solved these problems by providing in Paragraph 12 that Chrysler should incur the great competitive disadvantage and be bound for only a fixed time, until January 1, 1941. They made it an "express condition", therefore, that if the Government should not get its order within that time, then nothing in the decree should preclude Chrysler from having an interest in a finance company; but even in that event, Chrysler would remain subject to all of the other restraints of the consent decree.

The petition shows the original disparity between General Motors and Chrysler. The consent decree, by imposing upon Chrysler restraints to which General Motors has not been subjected, increased this disparity. By the time of trial and final appeal of the General Motors case the disparity and the disadvantage to Chrysler will have further increased.

The Government has convicted General Motors of conspiracy. If, at long last, the Government compels General Motors in the civil suit against the latter to divorce its finance company the conviction will be a factor in the deciding of that suit, a factor not present in the Chrysler case.

That divorce will not necessarily rest on a general rule of law, which up to this time no court has announced, that a manufacturing company may not have an interest in a finance company to help it market its product. The divorce may be merely an assurance against the consequences of the particular conspiracy and have no significance as a general rule of law.

The effect of Paragraph 12 of the consent decree against Chrysler was that, if the Government obtained its order against General Motors within the time limited, Chrysler would continue to be bound whether or not the decision against General Motors established a general rule. If, however, the Government failed to have its order within the time, then Chrysler was to be free of the unequal disadvantage which it had accepted for the interim period. But even in this latter event, Chrysler in the future would be bound by whatever the general law might then prove to be—bound not by reason of the consent decree but by general operation of law.

This is a fair and proper arrangement. Chrysler already has suffered a severe and important competitive disadvantage for the period that it undertook to do so, and also under the incorrect decisions of the lower court for more than a year besides. There is neither impropriety nor incongruity in Chrysler being subject only to the general rules of law and to the other terms of the consent decree while the Government proceeds against General Motors. This would not interfere with any endeavor of the Government to obtain in its civil suit against General Motors a decision that will establish general rules of law.

The Government has prohibited the manufacture and sale of automobiles for civilian use. All the probabilities are that there are among Chrysler's 10,000 dealers many who, in these times, will need help that independent banks and finance companies, deprived of the dealers' profitable

retail time sales business, will not be able or willing to provide. General Motors with its great finance company is able to accomodate its dealers. Chrysler is powerless. Moreover, if the Government suspends antitrust proceedings indefinitely, as appears to be its plan, General Motors will have its great advantage not only for the long time such proceedings normally take but also for the further period of this war time suspension. This advantage may mean the difference between General Motors' saving its dealer organization, an automobile manufacturer's most priceless treasure, and losing it, while Chrysler, if the unjust order of the lower court stands, is bound and sacrificed. If, when the war ends and the companies can make cars again, Chrysler still is bound and General Motors still has its finance company to help its dealers back into business by offering favorable wholesale and retail financing, Chrysler's plight will be still worse.

The suddenness of the attack on Pearl Harbor, the state of war, and the orders suspending the automobile business show clearly how unfair it is for courts to make illegal orders not resting upon evidence, merely because the trial judge does not at the moment think he sees disadvantage to the injured party. Neither the court nor the Government meets this by suggesting (R. 156) that Chrysler be allowed to bring formal proceedings from time to time for permission to do what the court below has attempted, without any basis of evidence, to prevent it from doing. This suggestion leaves out of account the expedition necessary in competitive business in ordinary times of peace, to say nothing of that required by the startling changes that occur in time of war. There is no basis in law or in justice for such an attempt to substitute, for the burden upon the Government of proving that Chrysler ought not to have a finance company, a burden upon Chrysler to establish that it ought to have one.

B. THE GOVERNMENT HAS WHOLLY FAILED TO PROCEED UPON PLEADINGS AND PROOF AS REQUIRED BY THE DECISIONS OF THIS COURT.

This Court has repeatedly established the methods and requirements necessary for obtaining the modification of consent decrees. Reference to these decisions will emphasize the unwarranted nature of the proceedings and decree here involved.

1.

The moving party—here, the Government—has the burden of pleading and proof.—The appellants denied the material allegations of the Government's original complaint and of the Government's motion (R. 64-66). The Government, as the moving party, had the burden of proving all the facts necessary to establish its right to impose or extend the restraint upon Chrysler. *United States* v. *Linn*, 1 How. 104, 111; *Lilienthal's Tobacco* v. *United States*, 97 U. S. 237, 267; *Henderson* v. *Carbondale Coal and Coke Co.*, 140 U. S. 25, 35. The Government's motion was not evidence. *Cucullu* v. *Hernandez*, 103 U. S. 105, 110; *United States* v. *International Harvester Co.*, 274 U. S. 693, 703. The Government has made no attempt to undertake this burden.

It was essential that the United States file a motion for leave to file a supplemental complaint under Federal Rule of Civil Procedure No. 15(d) in order that issues might properly be made and the case regularly heard and decided. *Osage Oil & Refining Co.* v. *Continental Oil Co.*, 34 F. (2d) 585, 589; *Kaw Valley Drainage Dist.* v. *Union Pac. R. Co.*, 163 Fed. 836, 837. Rule 15 (d) provides that, as to the "transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented," a supplemental pleading may be filed, but then only upon motion for the consent of the court and "upon

reasonable notice and upon such terms as are just'' with provision for a responsive pleading where advisable. In the present case, no attempt was made by the court below or the Government to comply with these requirements.

Upon such proceedings, the trial court would be required to make appropriate findings of fact. Such findings are required to be based upon evidence or upon relevant facts within the judicial knowledge of the court. *Helvering* v. *Tex-Penn Oil Co.*, 300 U. S. 481, 497; *Atchison, Topeka & Sante Fe R. R.* v. *United States*, 295 U. S. 193; *Florida* v. *United States*, 282 U. S. 194; *Collier* v. *United States*, 173 U. S. 79; *United States* v. *Clark*, 96 U. S. 37; *Courtney* v. *Walker*, 26 F. (2d) 583, 585; *Beckley National Bank* v. *Boone*, 115 F. (2d) 513, 515, cert. denied 313 U. S. 558.

2.

The Government has neither alleged nor proved grounds requisite for the modification of an antitrust consent decree.—The Government has not alleged or proved new or unforeseen states of fact, or any failure by Chrysler to comply with the consent decree or with law, or any threat to violate the consent decree or any law. Without such a showing the Government is not entitled to have the consent decree rewritten. *Swift and Company* v. *United States*, 196 U. S. 375, 396; *United States* v. *United States Steel Corporation*, 223 Fed. 55, 59, aff'd *United States* v. *U. S. Steel Corp.*, 251 U. S. 417, 445; *Industrial Ass'n* v. *United States*, 268 U. S. 64, 84; *Standard Oil Co.* v. *United States*, 283 U. S. 163, 179; *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344, 377; *United States* v. *E. I. du Pont de Nemours & Co.*, 188 Fed. 127, 129, 130; *United States* v. *E. I. du Pont de Nemours & Co.*, 273 Fed. 869, 873; *Aluminum Co. of America* v. *Federal Trade Commission*, 299 Fed. 361, 363, 365, cert. denied 261 U. S. 616.

In *United States* v. *Swift & Co.*, 286 U. S. 106, 119-120, the company sought to change a consent decree. In *United States* v. *International Harvester Co.*, 274 U. S. 693, 703, the Government sought to change one. In both cases this Court decided against rewriting the decree. In the *Swift* case, the court said:

> Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned. * * * What was then solemnly adjudged as a final composition of an historic litigation will not lightly be undone * * * and the composition held for nothing.

In the *Harvester* case, the court held that, to modify the consent decree over objection and without a showing that the situation under the consent decree was not in harmony with law or that the company was not complying with the consent decree,

> would be plainly repugnant to the agreement approved by the court and embodied in the decree, which has become binding upon all parties and upon which the [defendant] has, in good faith, been entitled to rely.

That the Government did not comply with the express condition of Paragraph 12 was not a new and unforeseen fact. This was precisely the possibility that the parties intended Paragraph 12 to provide for. The Government did not allege or prove that for Chrysler to have an interest in a finance company would be unlawful. The provision of Paragraph 12 of the consent decree conditionally limiting the right of Chrysler to have an interest in a finance company is not any indication of unlawfulness. The consent decree, in terms, provided that neither the decree nor Chrysler's consent thereto "shall be considered as an ad-

mission or adjudication that it has violated any statute" (R. 24). Ownership by one company of stock of another, even though it be stock of a finance company, is not ordinarily unlawful. In the General Motors criminal case, itself, the District Judge in charging the jury said (R. 65):[3]

> It is not unreasonable for the General Motors Company to have a finance company. * * * They have a perfect right to have a finance company and to recommend its use.

We do not know of any authority to the contrary.

The consent decree is as clear as language can make it that the restraints it imposes upon Chrysler are all the restraints that Chrysler consented to be bound by, and all the restraints that the parties intended by the decree to impose upon Chrysler. The Government was not entitled to the original consent decree except as Chrysler consented to it. The Assistant Attorney General at the time announced that he had joined in the consent because the decree contained terms that he could not have obtained by litigating (see Public Statement, Department of Justice, Consent Decrees in Automobile Finance Cases, November 7, 1938, pp. 4, 9). Without the consent of Chrysler, the Government would have had to prove facts and apply legal principles sufficient to support every clause of the decree under the Sherman Act. It would have had to establish that Chrysler could not lawfully have an interest in a finance company. In order to change the terms of that decree so as to extend any restraint upon Chrysler without Chrysler's consent, the Government must now allege and prove facts sufficient to entitle it to that relief under the Sherman Act. This it did not do.

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[3] See record in No. 352, October Term 1941, p. 1938.

Conclusion.

It is respectfully submitted that the decree of the District Court dated February 16, 1942, modifying the final consent decree should be reversed.

Respectfully,

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April, 1942.